Supreme Court, U.S.
FILED
OCT 27 1999

No. 99-534

In The

Supreme Court of the United States

MONTANA RAIL LINK, INC.,

Petitioner,

v.

ROBERT R. WATTS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the test for determining "employment" under the Federal Employers' Liability Act [45 U.S.C. § 51 (1939)] should be judicially expanded to include the distinct congressional standard utilized for establishing "employment" under the Railroad Retirement Act [45 U.S.C. § 231 (1976)].

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STATEMENT OF JURISDICTION

Plaintiffs (Respondents herein) filed complaints in the District Court for the Sixth Judicial District in Park County, Montana, in which they named Livingston Rebuild Center, Inc., and Petitioner Montana Rail Link, Inc., as defendants, seeking damages pursuant to the FELA, 45 U.S.C. §§ 51-60 (1939). The district court entered judgment in favor of MRL on September 30, 1993, and its decision is reprinted as Appendix 3 to the Petition.

The decision of the Montana Supreme Court was entered on February 8, 1999. On April 22, 1999, the Montana Supreme Court denied MRL's Petition for Rehearing. LRC did not join the Petition for Certiorari to this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

I. STATEMENT OF THE CASE

Each of the six Plaintiffs brought independent actions pursuant to the Federal Employee's Liability Act [hereinafter FELA], 45 U.S.C. §§ 51-60, to recover damages for injuries sustained while working for Defendant Livingston Rebuild Center. All six cases were consolidated for determination of the common issue of whether the Plaintiffs were entitled to bring FELA actions against the Defendants. The issue was tried in the Sixth Judicial District Court, Park County, Montana, before the Honorable Kenneth Wilson, sitting without a jury. The District Court entered Findings of Fact and Conclusions of Law in favor of Defendant Montana Rail Link, Inc., and Defendant Livingston Rebuild Center, Inc.

On appeal, the Montana Supreme Court reviewed the factual evidence in detail and reversed the District Court, holding that the employees were, in fact, subservants of Montana Rail Link under the test established in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1975), and therefore entitled to FELA coverage. The Montana Supreme Court held that there was no arms-length relationship between the two sister corporations, Livingston Rebuild Center did not function independently, and Montana Rail Link controlled the work and operation of Livingston Rebuild Center. *Watts, et al. v. Montana Rail Link, Inc.*, Appendix 1 to Petition, 1999 MT 18, ¶ 63, 975 P.2d 283, ¶ 63 (1999). Petitioner Montana Rail Link subsequently filed a 30-page petition for rehearing with the Montana Supreme Court challenging each factual finding in great detail. After review, the Montana Supreme Court denied the petition for rehearing. Petitioner Montana Rail Link now files a Petition for Writ of Certiorari to the United States Supreme Court. This case is limited to six workers who were injured at the Livingston Rebuild Center in Livingston, Montana, between its formation in January 1988, and its sale to an independent owner in May 1993. *Watts*, ¶ 65.

In 1883, the Northern Pacific Railroad built shops in Livingston to maintain and repair its locomotives and rail cars operating in the region. (Tr. 658.) For over 100 years, the workers in the Livingston shops worked directly for the Northern Pacific Railroad and its successor, the Burlington Northern Railroad. (Tr. 659.) They were railroad workers entitled to federally mandated railroad benefits.

In 1987, Dennis Washington and a small group of minority shareholders leased Burlington Northern's

southern line from Laurel, Montana, to Sandpoint, Idaho, and purchased in fee simple all of Burlington Northern's branch lines, rail yards, and repair facilities on that route. (Tr. 526-27.) The purchase included all of the Livingston shops along with several adjoining properties. (Tr. 546.) After that time, the workers in the Livingston shops were no longer entitled to railroad benefits because Dennis Washington and the other shareholders formed one corporation, Montana Rail Link [hereinafter MRL], to operate the railroad and a second corporation, Livingston Rebuild Center [hereinafter LRC], to operate the heavy repair shops. Many of the same workers continue to perform the same work in the same shop, but without FELA benefits. (Tr. 90-91, 664.)

Between the time that LRC was formed in January 1988 and its sale in May of 1993, the two companies shared common ownership and control. As the Montana Supreme Court found:

> . . . of the 32 shareholders who invested in MRL, 31 invested in LRC and constituted all of LRC's owners. The Dennis Washington Trust owned 79% of the stock in MRL and 78.49% of the stock in LRC.

Watts, ¶ 24. MRL recognized that it was cheaper to have all of its major repair work done by an independent contractor, such as LRC. Railroad workers were unionized workers, therefore, entailing higher costs in wages and retirement benefits. By having the work done by LRC, an allegedly independent contractor, MRL derived a 37% reduction in labor expenses. *Watts*, ¶ 23.

It is uncontested that each of the workers in this case was injured during his or her nominal employment with LRC. Following their injuries, they brought independent actions against MRL and LRC on grounds that they were entitled to FELA benefits like their predecessors who worked for Northern Pacific Railroad and Burlington Northern Railroad.

During the five-year time period at issue, the Boards of Directors for both MRL and LRC were chaired by the same individual. For part of that period it was the primary shareholder, Dennis Washington. *Watts*, ¶ 25. As the primary shareholder in both corporations, Dennis Washington had the right to choose the Board of Directors and officers of both corporations. He, thereby, effectively exercised exclusive control over both corporations. *Watts*, ¶ 27.

The Montana Supreme Court, in its detailed review of the facts, found that Dennis Washington and MRL's supervisors exercised direct control over the LRC employees. The MRL railroad and the LRC repair shops occupied the same building. *Watts*, ¶ 40. LRC employees performed work under the direct supervision of MRL supervisors. *Watts*, ¶¶ 42-53. Even the President of LRC acknowledged that there were occasions where MRL supervisors directed the work of LRC employees. *Watts*, ¶ 50. Not only did the MRL and LRC employees work in the same building, there was also a common exchange of tools, equipment and parts for railroad locomotive repair. *Watts*, ¶¶ 56, 57. MRL used LRC's property to store its equipment, railroad cars and locomotives without compensating LRC. *Watts*, ¶ 59.

In addition, LRC was required to convey significant amounts of real estate and operation facilities to MRL without compensation, or for less consideration than full market value. The common vice president of both corporations signed the property transfers as both vice president of MRL and vice president of LRC. (Tr. 555, 1163; Plaintiffs' Exh. 1, Quit Claim Deed, Jan. 4, 1988.) LRC was forced to give up valuable real estate and property to fulfill the needs of MRL including a part of LRC's shop facilities, four acres of real estate, a trailer park, a lumber yard, and a waste water treatment plant. *Watts*, ¶¶ 35-37. It is undisputed that the transfer of real estate to MRL was done without consideration. The Montana Supreme Court concluded these undisputed facts were "strong evidence of MRL's control over LRC." *Watts*, ¶ 39. The Montana Supreme Court also found that the principal owner and chairman of the Board of MRL "controlled virtually every significant detail of LRC's financial operation." *Watts*, ¶ 61.

The Montana Supreme Court, after extensive review of the facts, held that a master-servant relationship existed between MRL and LRC:

> . . . by not only the common control of MRL and LRC through its ownership and directorship, but also MRL's direct, frequent, and unique supervision of LRC's employees; MRL's at-will acquisition of LRC's property when acquisition was in MRL's self-interest; LRC's dependence on MRL for training, tools, equipment and parts; and MRL's use of LRC's property for its own purposes without compensation to LRC.

Watts, ¶ 65.

II. REASONS FOR DENYING THE WRIT

A. The Question Presented is Misleading.

Reading the question presented would lead one to believe that the Montana Supreme Court equated "employment" for purposes of the Railroad Retirement Act with "employment" under the Federal Employers' Liability Act. The conclusion is wrong. The question presented misstates the law, facts, and issues decided.

The Petitioner's question presented mischaracterizes the nature and importance of the Montana Supreme Court's decision in this case. The Montana Supreme Court did not judicially expand the test for employment under FELA and it did not equate employment under the Railroad Retirement Act with employment under FELA. Rather, the Montana Supreme Court simply acknowledged that the control of a subservant business by a railroad is one appropriate factor for consideration in determining employment under both the Railroad Retirement Act and FELA. The more appropriate question for this Court's consideration is: When a court considers the element of control as one factor in its determination of employment under FELA, and such factor happens also to be an appropriate consideration in determining employment under the Railroad Retirement Act, should the U.S. Supreme Court grant certiorari to review the lower court's fact-driven analysis?

MRL also attempts to portray a split of authority among the lower courts where none actually exists. The Montana Supreme Court's decision in this case was a fact-driven decision based on unique circumstances existing between two closely related corporations. MRL has

pulled out a single minor issue and attempted to create a significant federal question where none exists.

B. The Standard for Review Is Not Met.

The United States Supreme Court does not ordinarily grant a petition for writ of certiorari to review evidence and discuss specific factual findings. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *National Labor Relations Board v. Waterman S.S. Corp.*, 309 U.S. 206, 207 (1940). A petition of certiorari is not granted to merely review evidence or the lower courts' inferences drawn from that evidence. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). Rather, Rule 10 of this Court's Rules allows for review of a writ of certiorari for compelling reasons such as: where the United States Court of Appeals enters a decision which conflicts with a decision of another U.S. Court of Appeals on the same matter; or a state court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a U.S. Court of Appeals"; or where a state court has "decided an important federal question in a way that conflicts with relevant decisions of this court." The Rule further provides that a petition for a writ of certiorari is infrequently granted when the asserted error "consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

Respondents contend that the Montana Supreme Court's decision was fact-driven and the Court properly applied the law, but even if it did not, it does not warrant

the granting of a writ of certiorari. The Petitioner's argument is at best that the Montana Supreme Court misapplied the law. Even the dissent in the underlying opinion recognizes that the majority correctly stated the applicable law. There is no split of authority on this issue. All of the courts generally agree as to the controlling law. The Montana Supreme Court also agreed and applied the controlling law to the specific facts of this case. As shown below, the Petitioner does not meet the standards for granting a writ.

C. The Montana Supreme Court Did Not Rely upon the Railroad Retirement Board's Decision.

MRL's petition significantly misstates the Montana Supreme Court's application of the law in this case. The Montana Supreme Court did not, as MRL contends, rely upon the Railroad Retirement Board's decision in concluding that the LRC employees were entitled to FELA coverage. To the contrary, the Montana Supreme Court found that some of the factors considered by the Railroad Retirement Board in assessing employee status are also factors that are appropriately considered in determining whether an employee is under the control of the railroad. As the Montana Supreme Court noted, the Railroad Retirement Act statutorily defines the term "employer." It includes companies that are owned and controlled by a railroad. The Court specifically noted that the standards for defining an employee under the Railroad Retirement Act and under FELA are distinct. However, they do share some common elements. The common element considered by the Montana Supreme Court was control over one or more of the employees by a railroad. *Watts*, ¶¶ 28-30.

The Montana Supreme Court did not rely entirely or even primarily upon the findings of the Railroad Retirement Board and the Seventh Circuit Court of Appeals in reaching its decision that the Respondent employees were covered by FELA. The Court specifically noted that the decisions of the Railroad Retirement Board and the Seventh Circuit were not controlling:

> While we do not conclude that the decision of the Railroad Retirement Board or the Seventh Circuit Court of Appeals is dispositive of the issue in this case, we do think that the Board's finding that LRC was under the control of the principals of MRL is probative of the issue in this case. In addition, there was other undisputed evidence of the practical ways in which MRL's control over LRC was manifested.

Watts, ¶ 33. The Montana Supreme Court found that the Railroad Retirement Board decision was not dispositive of the issues, or controlling of the outcome of the case. Instead, it found that one of the factors included in the Railroad Retirement Board's decision, that of control, was a common factor in the determination of employment under the Federal Employer's Liability Act and the Railroad Retirement Act.

Control of LRC by MRL principals was probative. Black's Law Dictionary defines probative in an evidentiary sense as having a tendency to prove or contribute toward proof. Control of a supposedly independent corporation by a railroad is a factor in a subservant analysis under the *Kelley* test. This case, and others applying *Kelley*, recognize the importance of control of companies and their workers by a railroad in determining whether

workers can establish employment with a railroad for purposes of FELA. *See, e.g., Kottmeyer v. Consolidated Rail Corp.*, 424 N.E. 2d 345, 352 (Ill. App. Ct. 1981) (control of performance and manner of work, degree of control or supervision, as well as the right to control the employee's activities meets definition of "servant" in support of *Kelley*); *Warrington v. Elgine, Joiliet & Eastern Railway Co.*, 901 F.2d 88, 90 (7th Cir. 1990).

Servant and subservant relationships depend upon control by a master. The Montana Supreme Court simply recognized the common sense fact that the Railroad Retirement Act also includes the common element of control. Greater analysis was made in this case by the Montana Supreme Court to determine that the Respondents served a corporation which was in turn a servant of a railroad. Obviously, receipt of Railroad Retirement coverage is broader than FELA coverage. Railroad Retirement coverage depends on common ownership and control, whereas, FELA coverage depends on direct control. While employment for FELA purposes is narrower than Railroad Retirement, they do share the common element of control by a railroad.

In addition to the finding of control by the Railroad Retirement Board, the Montana Supreme Court recited a plethora of factual evidence for finding that MRL exercised control over LRC and its employees. Sixty of the seventy-four paragraphs in the opinion were devoted to specific factual findings showing MRL's control over LRC and its employees. Therefore, the Petitioner's argument concerning the Montana Supreme Court's reliance upon the Railroad Retirement Board's decision mischaracterizes the law, the Montana Supreme Court's decision and

the facts of this case. The Petition should be denied on these grounds alone.

D. There Is No Split of Authority.

The Petitioner attempts to create grounds for certiorari by alleging that there is a split among the courts concerning the factors to be applied in determining whether there is FELA coverage. There is, however, no split of authority. It is generally agreed by this Court, the Circuit Courts of Appeal, the State Supreme Courts and the Montana Supreme Court, that the test which this Court set forth in *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1975) controls the issue of determining employment status. The Montana Supreme Court carefully pointed out the controlling law, and followed that controlling law in this case. *Watts*, ¶¶ 5-6.

The Petitioner cites a number of cases for the proposition that a determination of employment for purposes of the Railroad Retirement Act is not controlling for FELA purposes. (Petitioner's Brief, pp. 10-12.) We agree. This Court, other jurisdictions and the Montana Supreme Court agree that a Railroad Retirement Board decision of employment is not determinative under FELA.

The Petitioner argues that the Montana Supreme Court's decision is at odds with other jurisdictions including this Court's holding that it is inappropriate to rely upon the findings of the Railroad Retirement Board. There is, however, no conflict in these decisions since the Montana Supreme Court did not rely upon the Railroad Retirement Board's decision but, instead, merely noted

that there is a common element of control under both the Railroad Retirement Act and the Federal Employer's Liability Act.

The Petitioner contends that the Montana Supreme Court's alleged reliance on the Railroad Retirement Board's decision conflicts with *Edwards v. Pacific Fruit Express Company,* 390 U.S. 538 (1968). Such contention is a misstatement of the law. In *Edwards,* the sole issue was whether a company that leased refrigerator cars to railroads performed enough railroad functions to be considered a "common carrier by railroad" for purposes of FELA. *Edwards,* 390 U.S. at 540. After review of pertinent legislative history, this Court concluded Congress intended to exempt refrigerator care companies from FELA coverage. *Id.* at 542. The *Edwards* decision did not deal with control of employees or companies by a railroad and the decision contains no discussion of the Railroad Retirement Act as evidence of FELA coverage. It merely noted legislation was passed to include refrigerator car companies under the Railroad Retirement Act. Petitioner misstates the law when it contends *Edwards* is in "direct conflict" (Petitioner's Brief, p. 9) with the Montana Supreme Court's decision.

Equally disingenuous is the contention that the *Watts* decision conflicts with other court decisions. The cases cited by Petitioner including *Brankin v. CSC Transportation, Inc.,* 1996 WL 627625 (N.D. Ill. 1996); and *Dixon v. CSX Transportation, Inc.,* 990 F.2d 1440 (4th Cir. 1993), did not involve the common element of "control" of employees and companies by a railroad. The Petitioner's argument that the Montana Supreme Court's reliance

upon the Railroad Retirement Board decision is at odds with other courts is merely a straw man argument.

E. The Montana Supreme Court's Decision is Limited.

The Petitioner argues that "as a result of the court's use of the Railroad Retirement Act finding in the context of FELA is to potentially subject every railroad in America with wholly owned subsidiaries to a plethora of FELA suits from employees who are otherwise covered under the states' respective Workers' Compensation Acts." (Petitioner's Brief, p. 12.) The Petitioner's use of hyperbole is unwarranted and incorrect. The Montana Supreme Court's decision is specifically limited to Montana. Furthermore, the Montana Supreme Court made it clear that its holding applies only to the six workers under the unique circumstances of control of LRC during the period between 1988, its inception, and 1993, when the LRC was sold to a third party who may not be subject to the control of MRL. The status of any other workers under any other circumstances were not before the Montana Supreme Court and are not subject to its decision. MRL is the only railroad based in Montana. Even if all factual and legal implications are taken in favor of the Petitioner, the Montana Supreme Court's decision carries little, if any, weight outside of its jurisdiction.

III. CONCLUSION

The Montana Supreme Court's decision in this case was a fact laden determination of limited scope and

impact. The question presented mischaracterizes the law, the facts considered, and the court decision below. There is no split of authority within the federal courts or state courts. Even if the Montana Supreme Court misapplied the correct test, it is not grounds to grant a writ of certiorari. The Petitioner fails to meet the standards for granting a petition for writ of certiorari.

Thus, Respondents respectfully request the Court to deny Montana Rail Link's Petition for Writ of Certiorari to the Montana Supreme Court.

RESPECTFULLY SUBMITTED this 27th day of October 1999.

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